Legal guidance provided May 2018 – English jurisdiction



**Helping vulnerable members of the community to make decisions**

1. **Scope of the guidance**
	1. This guidance is intended for area meetings and is aimed at helping them to assist vulnerable, sick and elderly adult members of their community to make decisions. Those decisions might be about day to day matters or they might be significant decisions such as moving into a care home or dealing with debt issues.
	2. Quaker meetings strive to provide a safe, welcoming space where anyone can be offered support if needed. Quakers are encouraged to be part of the community: its worship, ministry, social activity, witness and service.
	3. Some Friends, whether Elders or Overseers or not, are looked to for pastoral care and to support the needs of vulnerable members of the community. Elders and Overseers have particular responsibility to provide pastoral care.
	4. These guidelines summarise the duties, responsibilities and risks to be aware of when helping vulnerable members of the community to make decisions as well as highlighting the specific responsibilities where individual Friends take on legal responsibility for taking decisions on behalf of members of the community under powers of attorney.
	5. The aim of this guidance is to provide a foundation of awareness and knowledge which will enable Friends to respond appropriately to members in vulnerable circumstances.
2. **Helping vulnerable members**
	1. All Friends may at some stage in their life, be considered vulnerable or require additional care and support.
	2. A vulnerable member of the community may be someone who is rendered vulnerable by a specific situation, such as bereavement or illness, or may be vulnerable by reason of old age or because he or she is suffering from an impairment which affects his or her ability to make decisions. Vulnerability may be temporary or long-term.
	3. In this note we describe anyone in your community who may be vulnerable for any reason, whether temporarily or permanently, as a “vulnerable member”.
	4. Vulnerable members may still have capacity to make decisions on their own, but may need to depend on others, such as family and friends or may turn to those within their Quaker community to help them to make decisions.
	5. In some situations a vulnerable member may find it difficult to make a decision but they would have the capacity to make it with support.
	6. Pastoral care is an important aspect of the Quaker community and so, particularly where vulnerable members do not have family or others they can turn to, Friends are encouraged to help vulnerable members in need by supporting them to reach decisions. This may include supporting a vulnerable member with communication, explaining the possible consequences of a decision, or presenting information to them in different ways.
	7. Every vulnerable member should be given the support and help they need to make a decision before anyone concludes that they cannot make their own decision.
	8. However, it is important to be alert to the possibility that a vulnerable member may not have capacity to make decisions generally or to make a particular decision, even with support. The important distinction is whether the individual has a lack of capacity to make a decision or simply needs more support to be able to reach a decision themselves. For this reason, we highlight the legal issues around mental capacity below.
	9. Where you believe that a vulnerable member does not have capacity to make a particular decision, even with support, you will need to consider whether anyone else has legal power to make the decision on their behalf (see powers of attorney below). Unless you have been appointed as an attorney to make decisions on behalf of the vulnerable member, you must not take decisions on their behalf.
3. **The legal test for mental capacity to make decisions**
	1. You will need to consider whether a vulnerable member has capacity to make a decision, with the necessary support or whether they lack capacity to make that decision themselves, even with support.
	2. The legal test for mental capacity to make decisions is set out in the Mental Capacity Act 2005. As the issue of mental capacity has a distinct legal context, it needs to be understood so that members of the area meeting can act appropriately in relation to vulnerable members.
	3. Mental capacity is the ability to make a decision, ranging from everyday decisions to more significant decisions. The legal test for mental capacity provides that a person is unable to make a decision where they are unable to understand, retain and weigh the information necessary to make that decision and communicate that decision by any means due to an impairment of or a disturbance in the functioning of the mind or brain (common examples being dementia, significant learning disabilities or concussion).
	4. Mental capacity is not a fixed line: someone may have the capacity to make some types of decisions but not others; or they may not have capacity on one day but do have capacity the next day.
	5. There is a presumption that a person has capacity unless it is established that he or she lacks capacity. So the starting point is that you should assume that a vulnerable member is mentally capable of making decisions for themselves unless or until shown otherwise. Crucially, a person in not to be treated as unable to make a decision unless *all practicable steps* have been taken to help him or her make that decision, without success.
	6. An unwise or strange decision does not mean that someone lacks capacity; nor does the mere fact of a diagnosis of an illness or old age.
	7. The Mental Capacity Act specifically covers situations where someone is unable to make a decision because the way their mind or brain works is affected. A lack of capacity cannot be established merely by reference to a person’s age, appearance or any aspect of their behaviour which might lead others to make unjustified assumptions about capacity.
4. **Assessing mental capacity**
	1. Elders, Overseers or other Friends may find themselves in a situation where they need to assess or understand the capacity of a vulnerable member of the worshipping community who they have been supporting.
	2. The capacity of an individual to make a particular decision should be assessed by the person who is directly concerned with the individual at the time the decision needs to be made. In some cases it may be necessary to obtain a professional opinion about capacity.
	3. Friends may wish to refer to the steps plan at Appendix 1 of the policy, when assessing mental capacity.
	4. Where a Friend believes that a vulnerable member may lack capacity it is important that they do not act on their behalf or make decisions on their behalf (unless they have legal power to do so – see below in relation to powers of attorney).
	5. If a vulnerable member does lack capacity to make a decision for themselves, then someone else may need to make decisions on their behalf. In many situations, people who lack capacity will have the support of family members. However, occasionally, an elder, overseers or other Friends within the community may be asked to act on behalf of a vulnerable member.
	6. Adults over the age 18 may choose to appoint someone to make health, welfare and or financial decisions for them, under a lasting power of attorney in the event that they become unable to make these decisions for themselves.
5. **Lasting powers of attorney in brief**
	1. Sometimes elders, overseers or other members of the community might be asked to act as attorney for a vulnerable member. Before agreeing to take on power of attorney responsibilities, you should think carefully about the role and ensure that you understand your duties and any potential liability.
	2. Most importantly for you to bear in mind, if you enter into a power of attorney for a vulnerable member of the community, you will be doing so in your personal capacity. You will take on certain legal duties and responsibilities as attorney personally and not on behalf of/ in your capacity as an elder or overseer of your area meeting and you will not cease to be attorney just because you have stepped down from your role as elder/overseer.
	3. A power of attorney is a legal mechanism by which an individual can appoint another person to act and make decisions on their behalf. The individual granting the power is generally known as the donor and the person appointed to act is called an attorney.
	4. The relevant type of power of attorney here is a lasting power of attorney (“LPA”). The main purpose of an LPA is to allow people to appoint someone to make decisions on their behalf when they no longer have mental capacity to make decisions themselves.
	5. There are two different types of LPA:
* **A health and welfare LPA,** which is for decisions about health and personal welfare (for example, giving or refusing consent to medical examination and treatment); and
* **A property and financial affairs LPA,** which is for decisions about personal finances (for example, buying or selling property).
	1. The donor of an LPA, must have the mental capacity to appoint the attorney at the time the LPA is created. Before an LPA can be used, it must be registered with the Office of the Public Guardian.
	2. A donor can appoint the same attorney under both types of LPA or different attorneys under each type of LPA. If different attorneys are appointed under each type of LPA, they may need to act together on some decisions.
	3. A donor may appoint as many attorneys as they wish but should consider whether they wish the attorney to act jointly or jointly and severally.
	4. Attorneys appointed jointly must all agree and must always work together. Joint and several attorneys can act together but may also act independently if they wish. If attorneys are appointed jointly (but not severally) and one stops acting as an attorney, then the others cannot act either.
	5. It is also possible to nominate replacement attorneys in the event the sole attorney can no longer act. A replacement attorney will only be able to act in the way the original attorney was appointed to act.
	6. An LPA ends when the donor dies. In some situations, an attorney may choose to stop acting before this happens. If an attorney chooses to stop acting it is necessary to send a notification form to the donor and to the Office of the Public Guardian. There are also some cases where the law requires you to stop acting as an attorney.
	7. For further guidance on LPAs, including the formalities for creating an LPA, the types of decisions which can be made and any restrictions, and the process for termination an LPA, please see: <https://www.gov.uk/government/publications/make-a-lasting-power-of-attorney>
1. **Considerations for Friends considering acting as an attorney for a vulnerable member**
	1. Friends with eldership and oversight responsibility care for people that attend meetings and may agree to enter into an LPA as an extension of this support, although this is not expected of them. Friends who agree to act as an attorney will be doing so in a personal capacity and their responsibilities towards the donor will continue after their term as an elder or overseer has ceased.
	2. Agreeing to become an attorney means that you will take on an important role as you will be able to make decisions on behalf of the donor. Every attorney will have a duty of care and must follow the principles in the Mental Capacity Act 2005 and the Code of Practice: <https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice>
	3. In brief, any act done or decisions made on behalf of someone who lacks capacity must be done in their best interest, after considering what is known about their preferences. If there is more than one attorney appointed jointly they will need to consult with each other to work out what is in the donor’s best interests.
	4. People close to the donor may not always agree about what is in the donor’s best interest. It is advisable to keep records of discussions in order to illustrate how a decision has been reached. As long as a decision is in the best interest of the donor, an attorney will be protected from liability.
	5. If an attorney acts outside their authority, or if anyone suspects that the attorney is not performing their duties properly, the attorney may be investigated by the Office of the Public Guardian and may be personally liable to third parties or to the donor.
	6. The termination of an LPA can cause serious problems for the donor. For example where:
* only one attorney has been appointed, the LPA would stop working all together; or
* if an attorney is required to act jointly for some or all decisions then they will not be able to make those decisions.
	1. It is important to consider the potential for any future problems surrounding the termination of the LPA, at the time the LPA is created. A Friend who has been appointed as an elder or overseer for their area meeting may be asked, because they hold that role, to take on responsibility for acting as attorney for a vulnerable member. But, as noted, the attorney role is taken on by the Friend personally and so the Friend will continue as attorney even once the Friend steps down from being elder or overseer. If a Friend believes that they are unlikely to be able to act as an attorney for the duration of the donor’s life, it may be more appropriate for them to act alongside other attorneys on a joint and several basis or not to take on the role at all.
1. **Decisions about gifts and charitable donations**
	1. Friends, overseers or elders may be in a situation where they are asked to help a vulnerable member of the community with a decision about a gift or charitable donation. Gifts are an important way for an individual to preserve their relationships with the friends and family. However, it is necessary to be aware of the strict rules on gift- making.
	2. Before helping the vulnerable member to reach any decision on gifting, you must try to find out whether the person has the mental capacity to make the decision themselves, which may be with your support.
	3. If you consider that the person has the capacity to make a decision about a gift or charitable donation you are recommended to keep a record of the steps you took to make sure they did and any steps you took to support them to make their decision. If a substantial gift is involved, or if you are unsure about their mental capacity, you may need to seek professional advice.
	4. Occasionally you might be asked to support a vulnerable member to make a decision to make a donation to your area meeting or to one of the many Quaker charities. Great care needs to be taken as there may be a risk that you are perceived to have influenced or coerced them to make the donation or taken unfair advantage of them which could mean that the gift is invalid and there is a risk to the reputation of the Quaker movement itself. You are strongly recommended to keep careful records of your assessment of their capacity and how you have supported them to reach their decision. Depending on the circumstances, but particularly if a large or unusual donation is proposed, you may also need to ensure that the vulnerable member receives independent advice.
	5. If the vulnerable member lacks capacity and you have been appointed as their attorney under an LPA (property and financial affairs), the general rule for attorneys is that apart from some exceptions, the law says you must not make gifts from an individual’s estate.
	6. For an attorney acting under a property or financial affairs LPA, in order to count as an exception, the gift must satisfy the points below. It must be:
* Given on a customary occasion for making gifts within families or among friends (for example, birthdays, weddings or Christmas);
* to someone related or connected to the person, or if not a person to a charity the person supported; and
* of reasonable value taking into account the circumstances in each case and in particular the size of the person’s estate.
	1. In order to work out whether a gift is reasonable you must consider the impact of the gift on the person’s financial situation (taking into consideration current and future income, saving and future needs) and whether making the gift would be in the person’s best interest.
	2. Attorneys must follow any restrictions or conditions set out in the LPA. If an attorney wants to make a gift which falls outside the legal restrictions, or they are unsure whether they have the authority to make a proposed gift, they should apply to the Court of Protection for approval. If a donation is proposed to be made to a Quaker charity or to the area meeting, seeking approval is recommended.
1. **Summary of practical tips and best practice**
	1. *If you are assisting a vulnerable member of the worshiping community with decision making, you should identify the specific decision and take all practical steps to help the person make the decision.*
	2. *You must consider whether the vulnerable member understands the decision and, whether they are able to make the decision with your support. If a person has capacity they should make a decision themselves however, you should carefully document the basis for their decision.*
	3. *Where you think a vulnerable member may lack the capacity to make a decision you should not make the decision for them unless you have been appointed as their attorney/you may need to seek professional advice.*
	4. *If a vulnerable member asks you to act for them under a power of attorney, you must carefully consider the responsibility before agreeing to act and ensure that you are comfortable acting in a personal capacity. You may want to consider whether more than one attorney should be appointed, the basis on which you should act (i.e. jointly or jointly and severally) and whether a replacement attorney should be nominated.*
	5. *If you are acting under a power of attorney you have an obligation to act in the best interest of the donor. Wherever appropriate you should seek professional advice and keep clear accounts and records of all transactions and decisions you have made on behalf of the donor.*

**APPENDIX 1**

**Steps for establishing a lack of capacity**

